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Mohd Shamshir bin Md Rasid v Public Prosecutor

B FEDERAL COURT (PUTRAJAYA) — CRIMINAL APPEAL NO 05–59 OF 2008(N)
ZAKI AZMI CHIEF JUSTICE, ZULKEFLI AND JAMES FOONG FCJJ
3 SEPTEMBER 2009

C *Criminal Law — Dangerous drugs — Trafficking — Appeal against conviction and sentence — Whether deferment of decision of trial judge on admissibility of caution statement serious misdirection — Whether appellant prejudiced by misdirection — Dangerous Drugs Act 1952 ss 39B(1)(a) & 39B(2)*

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Evidence — Statement — Cautioned statement — Admissibility — Voir dire conducted to determine admissibility of statement — Trial judge deferred decision on voir dire — Whether deferment of decision of trial judge on admissibility of caution statement serious misdirection — Whether appellant prejudiced by misdirection

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When the police set-up a road block along Jalan Kongkoi-Genting Peras, in Negeri Sembilan, they stopped a motorcar with four occupants. These four occupants were then subjected to a body search. In this search the police found
F packets of drugs from the trousers of the driver of the car and Mohd Shamsir bin Md Rasid ('the appellant'). The police then searched the car and recovered a bag placed underneath the driver's seat. This bag was found to contain the appellant's personal effects and 366.1g of cannabis. The appellant was arrested and charged with trafficking in the cannabis found in the bag. After his arrest
G the appellant made a caution statement admitting to purchasing the cannabis and subsequently putting it into the bag, and placing the bag beneath the seat of the driver of the car that he was travelling in. At the trial in the High Court, the appellant challenged the admissibility of the caution statement on the grounds that he had not made it voluntarily. A voir dire was conducted to
H determine the admissibility of the caution statement but the trial judge did not make an immediate ruling on the issue of its admissibility. Instead he proceeded with the trial proper and at the close of the prosecution case decided that the caution statement by the appellant was made voluntarily. The caution statement was then admitted as an exhibit. In his defence the appellant stated
I that the bag belonged to one Aman, a co-passenger travelling in the car with the appellant, and that Aman had allowed the appellant to keep his personal effects in Aman's bag. The High Court found the appellant guilty and sentenced him to death under s 39B(2)of the Dangerous Drugs Act 1952. The Court of Appeal affirmed the conviction and sentence and hence the present appeal. In

this appeal the appellant submitted that the trial judge had misdirected himself when he deferred his decision on the voir dire to after the close of the prosecution case. The appellant contended that this deferment prejudiced his case. The sole issue for determination in this appeal was a point of law as to whether the deferment of the decision of the trial judge on the admissibility of the caution statement was a serious misdirection.

Held, allowing the appeal and acquitting and discharging the appellant:

(1) After the close of the voir dire it was imperative upon the trial judge to make a decision as to whether the caution statement was voluntarily made by the appellant. The trial proper should not commence until after this decision was made. A decision on the admissibility of the caution statement after the voir dire was crucial to both the prosecution and the defence before the trial proceeded further and any delay with this decision would be prejudicial to both the defence and the prosecution. As such the deferment of the decision on the admissibility of the caution statement in the present case was a serious misdirection by the trial judge, which severely prejudiced the appellant (see paras 9 & 11).

(2) The caution statement in the present appeal was the mainstay of the prosecution case. Without this caution statement there was no evidence to link the appellant to the drugs. Most important was that from the evidence there was a reasonable likelihood that the bag could belong to any of the four passengers in the car. Further the appellant had explained in his defence that although his personal belongings were in the bag, which contained the drugs, the bag did not belong to him but to a co-passenger who had agreed to keep the appellant's items in the bag. This defence would be sufficient to rebut the prosecution case that he was trafficking in the drugs (see para 12).

[Bahasa Malaysia summary

Apabila pihak polis mengadakan sekatan jalan raya sepanjang Jalan Kongkoi-Genting Peras, di Negeri Sembilan, mereka memberhentikan sebuah kereta yang dinaiki empat orang penumpang. Keempat-empat penumpang dikenakan pemeriksaan badan. Ketika pemeriksaan ini, polis menjumpai paket-paket dadah dalam seluar pemandu kereta tersebut dan Mohd Shamsir bin Md Rasid ('perayu'). Pihak polis kemudian memeriksa kereta tersebut dan merampas beg yang diletakkan di bawah tempat duduk pemandu. Beg ini didapati mengandungi barangan peribadi perayu dan 366.1g kanabis. Perayu telah ditangkap dan didakwa mengedar ganja yang dijumpai dalam beg. Selepas dia ditangkap, perayu membuat pernyataan beramaran mengakui membeli ganja dan seterusnya meletakkan ia ke dalam beg, dan meletakkan beg di bawah tempat duduk pemandu kereta yang dipandunya. Ketika perbicaraan di Mahkamah Tinggi, perayu mencabar kebolehterimaan pernyataan beramaran atas alasan bahawa dia tidak membuatnya secara

A sukarela. Satu perbicaraan dalam perbicaraan telah dijalankan untuk menentukan kebolehterimaan pernyataan beramaran, tetapi hakim bicara tidak membuat keputusan segera mengenai isu kebolehterimaan dokumen itu. Sebaliknya, beliau meneruskan dengan perbicaraan sebenar dan di akhir kes pendakwaan memutuskan bahawa pernyataan beramaran oleh perayu telah B dibuat secara sukarela. Pernyataan beramaran ketika itu diterima sebagai ekshibit. Dalam pembelaannya, perayu menyatakan bahawa beg itu kepunyaan Aman, penumpang bersama yang berada di dalam kereta dengan perayu, dan bahawa Aman telah membenarkan perayu untuk menyimpan barangan peribadinya di dalam beg Aman. Mahkamah Tinggi mendapati C perayu bersalah dan menjatuhkan hukuman mati di bawah s 39B(2)Akta Dadah Berbahaya 1952. Mahkamah Rayuan mengekalkan sabitan dan hukuman dan perayu kini merayu. Dalam rayuan ini perayu menghujahkan bahawa hakim bicara telah tersalah arah dirinya sendiri apabila beliau menangguhkan keputusannya berkenaan perbicaraan dalam perbicaraan di D akhir kes pendakwaan. Perayu berhujah bahawa penangguhan ini memprejudiskan kesnya. Satu-satunya iIsu untuk diputuskan dalam rayuan ini adalah poin undang-undang terhadap sama ada penangguhan keputusan hakim bicara bagi kebolehterimaan pernyataan beramaran adalah satu salah arah yang serius.

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Diputuskan, membenarkan rayuan dan membebaskan dan melepaskan perayu:

(1) Di akhir perbicaraan dalam perbicaraan, adalah penting bagi hakim F bicara untuk membuat keputusan sama ada pernyataan beramaran yang dibuat oleh perayu adalah secara sukarela. Perbicaraan sebenar tidak perlu bermula sehingga selepas keputusan ini telah dibuat. Satu keputusan mengenai kebolehterimaan pernyataan beramaran selepas perbicaraan dalam perbicaraan adalah penting untuk kedua-dua pihak G pendakwaan dan pihak pembelaan sebelum perbicaraan berjalan lagi dan apa-apa kelewatan keputusan ini akan memudaratkan kedua-dua pertahanan dan pihak pendakwaan. Oleh yang demikian, penangguhan keputusan bagi kebolehterimaan perbicaraan dalam perbicaraan dalam kes ini adalah satu salah arah yang serius oleh hakim bicara, yang H memprejudiskan perayu (lihat perenggan 9 &11).

(2) Pernyataan beramaran dalam rayuan ini adalah tulang belakang kes pendakwaan. Tanpa pernyataan beramaran ini, tiada bukti untuk mengaitkan perayu dengan dadah tersebut. Paling penting adalah bahawa daripada bukti, terdapat kemungkinan munasabah bahawa beg I tersebut boleh dimiliki oleh mana-mana empat penumpang di dalam kereta. Tambahan lagi, perayu telah menjelaskan dalam pembelaan walaupun barangan peribadinya di dalam beg yang mengandungi dadah, beg itu bukan miliknya tetapi milik penumpang bersama yang telah bersetuju untuk menyimpan barangan perayu di dalam beg. Pembelaan

ini cukup untuk menyangkal kes pendakwaan bahawa dia mengedar dadah (lihat perenggan 12).] A

Notes

For cases on cautioned statement, see 7(2) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 2734–2763. B

For cases on trafficking, see 4 *Mallal's Digest* (4th Ed, 2010 Reissue) paras 191–274.

Cases referred to C

Abdul Mahmud v PP [1980] 2 MLJ 50 (refd)
R v Francis and Murphy 43 Cr App R 147 (refd)
Yau Sun Fatt v PP [1988] 1 MLJ 248, SC (refd)

Legislation referred to D

Dangerous Drugs Act 1952 ss 39B(1)(a), 39B(2)

Hisham Teh Poh Teik (Teh Poh Teik & Co) for the appellant.
Nurul Huda bt Mohd Nor (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent. E

James Foong JCA (delivering judgment of the court):

[1] The appellant was charged under s 39B (1)(a) of the Dangerous Drugs Act 1952 (DDA) for trafficking in 366.1g of cannabis on the 11 March 2000. He was found guilty by the High Court and was sentenced to death under s 39B(2) DDA. His appeal to the Court of Appeal was unsuccessful and his conviction and sentence affirmed. Dissatisfied, he appealed to this apex court. F

[2] The facts of this case are rather straight forward. On 11 March 2000, the police set up a road block along Jalan Kongkoi-Genting Peras, Jelebu, in Negeri Sembilan. At about 6.30pm they stopped a motorcar bearing registration No BED 2621. There were four occupants. The driver was one Shafawi ('SP8') and beside him was a person by the name of Subir. At the rear, directly behind SP8, was one other person by the name of Aman and then next to him was the accused. G H

[3] A body search was conducted on all four occupants travelling in the said car and from the trousers of SP8 and the appellant packets of drugs were found. More pertinent to this case was the discovery, by the police officer (EW4) who conducted the search, of a bag with the brand name of 'Puma' placed underneath the driver's seat more towards the rear. Inside was the cannabis for which the appellant was charged for trafficking. Aside from the drugs, in the said bag was a bunch of house keys for access into the appellant's sisters' house, I

a medical certificate issued by the Kajang Hospital for the appellant and, an out patient card in the appellant's name issued by the same hospital.

[4] After the appellant was arrested, he made a caution statement to the police admitting to purchasing the said drugs and subsequently putting it into the said bag. He also confirmed that he kept his medical certificate and his hospital card together with the keys to his sisters' house in the said bag and then placed the bag beneath SP8's seat.

[5] At the trial in the High Court, the appellant challenged the admissibility of his caution on the ground that it was not voluntarily made. A voir dire (trial within a trial) was conducted to determine its admissibility. After the voir dire was concluded, the trial judge did not make an immediate ruling on this issue. He expressly announced that he would defer his decision until after the close of the prosecution's case. The trial proper then proceeded, after the voir dire, with the prosecution calling SP9, the person who recorded the caution statement, to complete his testimony that he handed the caution statement after recording it to the investigating officer SP6. The next witness was SP6 who completed his testimony after the interruption of the voir dire. With the close of the prosecution case and the normal offer of the prosecution's witnesses to the defence, the trial judge delivered his decision on the voir dire: that the caution statement by the appellant was voluntarily made by the appellant. He then admitted it as an exhibit marked P20.

[6] It is on the deferment of the decision on the voir dire by the trial judge to after the close of the prosecution case, rather than immediately after it was completed, that the appellant contends before us that the trial judge has misdirected himself. The reasons proffered: (a) the deferment of this decision amounts to allowing the prosecution to re-open their case after it was closed; (b) the appellant was prejudiced and/or disadvantaged by having to conduct his case during the prosecution stage without the benefit of knowing whether his caution statement is to be admitted.

[7] This issue on the deferment of the decision of the trial judge was not raised in the High Court or the Court of Appeal. But as this is a point of law we decided to entertain it. This concerns an important aspect of the criminal procedural law relating to a fair trial accorded to an accused person.

[8] It is well settled that when a challenge is mounted by a person on the voluntariness of his caution statement it is incumbent upon the prosecution to

establish it otherwise. To determine the admissibility of this caution statement, a voir dire or a trial within a trial has to be conducted by the trial judge. The trial of the case proper in the meantime is still in the prosecution stage. It is temporarily halted or put on hold for the voir dire to proceed. In the voir dire, the prosecution has to prove that the caution statement was voluntarily made by the accused, in the sense that it was not obtained by threat or inducement or with the hope of getting an advantage on a promise held out by a person of authority to the accused. To satisfy this, the prosecution must adduce evidence and the accused who made the caution statement is permitted to cross-examine any witness called by the prosecution. Similar rights are accorded to the prosecution to cross examine any witnesses of the accused called to negate the contention of the prosecution — see *Abdul Mahmud v Public Prosecutor* [1980] 2 MLJ 50.

[9] It is our view that after the close of the *voir dire*, it is imperative upon the trial judge to make a decision as to whether the caution statement is voluntarily made by the accused. It is necessary that until the trial judge makes his decision this document has yet to be admitted as evidence for the prosecution's case. The trial proper should not recommence until after this decision is made. If the decision on the admissibility of the caution is delayed and the case proper is directed to continue then both the prosecution and defence would be uncertain as to how to conduct his case in the meantime. For the prosecution, if the caution statement is rejected they may wish to call further evidence to prove their case. Otherwise, they may be confident to rest on the caution statement and on whatever evidence they have advanced thus far. For the defence, there is the difficulty on how to frame questions for cross-examination of the remaining prosecution witnesses; whether to ask question relating to the contents of the caution statement or to leave it out. If questions are directed to the contents of the caution statement, corresponding replies may prejudice the accused if the court were to subsequently decide to reject the caution statement. So a decision on the admissibility of the caution statement after the voir dire is crucial to both the prosecution and the defence before the trial proper proceeds further. Any delay with this decision (and certainly if delivered only after the close of the prosecution case) would be prejudicial to both the defence and the prosecution. It is our view that this must be avoided and the trial judge must decide on the admissibility of the caution statement before proceeding f with the trial proper. This approach has been adopted in *Abdul Mahmud v Public Prosecutor* where justice Syed Agil Barakbah declared:

A At the close of the case (voir dire) the court has to make a decision whether the statement (caution statement) was made voluntarily or otherwise.

[10] A similar sentiment is expressed in Supreme Court decision of *Yau Sun Fatt v Public Prosecutor* [1988] 1 MLJ 248 where Lee Hun Hoe CJ (Borneo) repeated Parker LCJ said in *R v Francis and Murphy* 43 Cr App R 147at p 146:

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> It has always been the settled practice in cases of this sort for a challenge to be made to the admissibility of the statement at an early stage in the absence of the jury. The matter is set out in the 34th (1959) Ed of Archbold's Criminal Pleadings, etc, at paras 1114–1115. 'The proper course', it is said there, 'where objection is raised to the admissibility of an alleged confession, is for the judge to hear evidence in the absence of the jury and to rule upon that evidence whether the alleged confession should be admitted or not.' The passage goes on to say that the evidence of the prisoner may be admitted to that stage. Then, if the evidence is admitted, 'the weight and value of a confession remain matters for the jury.' It is quite clear that a prisoner is entitled both to a ruling on admissibility from the judge and also to hear the verdict of the jury on the weight and value of the confession.

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[11] Based on the rational set out above, we consider the deferment of the decision on the admissibility of the caution statement under the circumstances as described is a serious misdirection by the trial judge. He should have made a decision after the voir dire on the caution statement and before proceeding further with the trial of the case proper. By deferring this decision and directing to proceed with the case proper until after the prosecution has closed their case has, in our opinion, severely prejudiced the appellant.

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[12] From our perusal of the appeal record, the caution statement in this case is the mainstay of the prosecution case. Without this caution statement all that the prosecution has proved against the appellant was the presence of the said bag containing drugs and some personal belongings of the accused and that this bag was found in the said car occupied by four male adults of whom the accused was one. The appellant was neither holding the said bag nor sitting directly in front of it. Another person, Aman, was seated directly behind the bag. Except for the appellant's personal belongings found in the bag, there is no evidence to link the accused to the drugs. Most important is that from the evidence, there is a reasonable likelihood that the bag could belong to any of the passengers in the car, Aman in particular. Regarding these personal items found in the bag, the appellant has explained in his defence that he has requested Aman to keep them for him in Aman's bag and Aman could not be traced to give evidence for the prosecution or the defence. As the law requires the appellant to only raise a reasonable doubt in his defence this would be sufficient to rebut the prosecution case that he was trafficking in the said drugs.

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[13] Due to the serious misdirection by the trial judge as described, we consider the conviction unsafe to stand. We therefore allow this appeal and set aside the conviction and sentence. The appellant is accordingly acquitted and discharged.

Appeal allowed and appellant acquitted and discharged.

Reported by Kohila Nesan